82-346

PETITION

Office - Supreme Court, U.S.
FILED
AUG 23 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

No. _____

DR. JOSEPH T. SKEHAN,

Petitioner,

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, DR. ROBERT NOSSEN, DR. CHARLES CARLSON, JOHN PITTENGER, Superintendent of Education, Commonwealth of Pennsylvania, and BLOOMSBURG STATE COLLEGE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT
Nos. 81-1094 and 81-1299

PETITION FOR A WRIT OF CERTIORARI

DR. JOSEPH T. SKEHAN
petitioner
pro se

Dr. J. T. Skehan
638 East Third Street
Bloomsburg, Pa., 17815
tel. (717) 784-7368

QUESTION PRESENTED

Whether, in order to provide effective relief for violations of the Fourteenth Amendment, a State can be required to give monetary relief on the ground that the later enactment of the Fourteenth Amendment limited the sovereign immunity granted to the States by the Eleventh Amendment.

TABLE OF CONTENTS

page

OPINIONS BELOW.....3
JURISDICTION.....8
QUESTIONS PRESENTED.....8
STATEMENT.....9
REASONS FOR GRANTING THE WRIT.....16
CONCLUSION.....20

TABLE OF AUTHORITIES

CASES:

Brungard v. Hartman, 12 Pa. Commw. 477, 315 A. 2d 913 (1974).....12,14
Brungard v. Mansfield State College, 491 Pa 114, 419 A.2d 1171 (1980).....15
Clark v. Barnard, 108 U.S. 436, (1883).....16,20
Edelman v. Jordan, 415 U.S. 651 (1974)..14,15,17,18
Fitzpatrick v. Bitzer, 427 U.S. 445(1976).....15
Florida Department of Health and Rehabilitation Services v. Florida Nursing Home Association, ___U.S.___101 S. Ct. 1032(1981).....20
Gibson v. Commonwealth of Pennsylvania, 490 PA 156, 415 A 2d 80 (1980).....15
Greenfield v. Vesella, 457 F. Supp. 316 (W.D. PA 1978).....15,16
Hans v. Louisiana, 134 U.S. 1 (1980).....16
Hutto v. Finney, 437 U.S. 678 (1978).....15
Liddi v. State of California, 478 F. 2d 552 (9th Cir.1973).....14
Mayle v. Pennsylvania Department of Highways, 388 A 2d 709, 479 PA 384 (1978).....15,16
Missouri v. Fiske, 290 U.S. 18 (1933).....14
Monell v. Department of Social Services of the City of New York, 436 U.S. 658.....12,15,16
State of Nevada et al. v. Hall, 440 U.S. 410.....20

CONSTITUTIONS

Commonwealth of Pennsylvania, Art. I Sect.11.....18
U.S. Constitution, Art. III, Sect. 2.....8
Amendment XI 8,11,17,18
Amendment XIV.....8,14,17,18

IN THE

Supreme Court of the United States

October Term, 1981

No. .....

DR. JOSEPH T. SKEHAN,

Petitioner,

v.

BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE, DR. ROBERT NOSSEN, DR. CHARLES CARLSON, JOHN PITTENGER, former Superintendent of Education of the Commonwealth of Pennsylvania, and BLOOMSBURG STATE COLLEGE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Dr. Joseph T. Skehan ("Dr. Skehan"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit. rendered in these proceedings on January 26, 1982) 1a–26a.

Opinions and Judgments Below

The United States District Court for the Middle District of Pennsylvania entered judgment, awarding plaintiff $1.00, together with costs, on May 11, 1973, with opinion. The judgment and opinion are printed in the Appendix at 251a-261a and the opinion is reported at 358 F.Supp. 430 (M.D.Pa. 1973). The District Court denied the motions of Dr. Skehan to

amend the judgment and to award attorneys fees on June 12, 1973, with opinion. The opinion and order are printed in the Appendix at 263a–265a and are unreported. The District Court denied Dr. Skehan's motion to reconsider its opinion on June 13. 1973. The order is printed in the Appendix at 266a–267a and is unreported.

The United States Court of Appeals for the Third Circuit entered judgment, vacating the judgment of the District Court and remanding for findings of fact and further proceedings, on May 3, 1974, with opinion. The judgment and opinion are printed in the Appendix 221a–245a and the opinion is reported at 501 F.2d 31 (3d Cir. 1974). The Court of Appeals denied rehearing on June 11, 1974, without opinion. The order of the Court of Appeals is printed in the Appendix at 250a

This Court entered an order granting Dr. Skehan's petition for a writ of certiorari on May 27, 1975, and by the same order vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals for further consideration in light of *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975) and *Wood v. Strickland,* 420 U.S. 308 (1975). The order of this Court is printed in the Appendix at 220a and is reported at 421 U.S. 983 (1975).

The Court of Appeals entered judgment, vacating the judgment of the District Court and remanding the case to the District Court for findings of fact and further proceedings, on May 13, 1976, with opinion. The opinion of the Court of Appeals is printed in the Appendix at pag 198a–219a and is reported at 538 F.2d 53 (3d Cir. 1976). This Court denied the petition of present respondents, the Board of Trustees of Bloomsburg State College, Dr. Robert Nossen, Dr. Charles Carlson, John Pittenger, former Superintendent of Education of the Commonwealth of Pennsylvania, and Bloomsburg State College, on November 29, 1976, without opinion. The order of this Court is printed in the Appendix at 197a .

The District Court denied Dr. Skehan's motion for leave to file an amendment to the complaint on December 23, 1974, with opinion. The opinion and order are printed in the Appendix 195a–197a and are unreported. The District Court denied Dr. Skehan's motion to take additional testimony and granted respondents' motion to take additional testimony on January 10, 1977, with opinion. The opinion and order are printed in the Appendix at pag190a–194a and are unreported.

The District Court entered judgment on March 24, 1977, on Dr. Skehan's First Amendment claim with order and opinion. The order and opinion are printed in the Appendix at 173a 189aand are unreported.

The District Court entered an interlocutory judgment on May 18, 1977, without any operative provision. The judgment was an aborted effort to implement the opinion of the District Court entered the same day, holding that Dr. Skehan prevailed on several parts of his claims and that respondent Nossen prevailed on certain defenses. The judgment and opinion are printed in the Appendix 145a–170a and the opinion is reported at 431 F.Supp. 1379 (M.D.Pa. 1977).

The District Court entered judgment on July 20, 1977, with opinion, providing that Dr. Skehan's claim for attorneys fees and expenses was denied; that Dr. Skehan should be restored to "the suspended status" which he had on October 15, 1970; and that a series of hearings and other procedures should commence to determine whether his contract of employment as a faculty member of Bloomsburg State College should be renewed and, if renewed, whether he should be terminated for cause or whether proceedings against him should be dropped. The judgment and opinion are printed in the Appendix at pages 122–45a and the opinion is reported at 436 F.Supp. 56 (M.D.Pa. 1977).

The District Court denied Dr. Skehan's motion for a new trial without prejudice on August 2, 1977, without opinion. The order is printed in the Appendix at pages 107–8a. The District Court denied Dr. Skehan's petition to plead and conduct his own case during the post-trial proceedings on August 10, 1977, without opinion. The order is printed in the Appendix at pages 109–10a. The District Court denied the motion of counsel who represented Dr. Skehan to withdraw, without prejudice, on August 22, 1977, without opinion. The order is printed in the Appendix at 111–12a. The District Court denied Dr. Skehan's motion to reinstate his motion for a new trial and to plead and conduct his own case without prejudice, on August 22, 1977, without opinion. The order is printed in the Appendix at 113–4a.

The District Court granted the motion of counsel for Dr. Skehan to withdraw on August 31, 1977, without opinion. The order is printed in the Appendix at 115–6a. The District Court granted Dr. Skehan's motion to plead and conduct his own case on September 12, 1977, without opinion. The order is printed in the Appendix at 117–8a. The District Court denied Dr. Skehan's motion for a new trial on September 22, 1977, with opinion. The opinion and order are printed in the Appendix at 119–21a and are unreported.

The Court of Appeals denied Dr. Skehan's motion to stay part of the District Court's order of July 20, 1977, pending final determination of all motions and appeals challenging it, on November 4, 1977, without opinion. The order is printed in the Appendix at 100–1a. The Court of Appeals denied Dr. Skehan's motion to reconsider its order denying his motion for a stay, on November 30, 1977, without opinion. The order is printed in the Appendix at 98a–99a.

The Court of Appeals entered judgment on December 21, 1978, affirming the judgment of the District Court of July 20, 1977, excepting that the case was remanded to the District Court for consideration of an award of attorneys fees to Dr. Skehan against the defendants in their official capacities, on December 21, 1970, with opinion. The opinion and judgment are printed in the Appendix at pages 45 through 96a and the opinion is reported at 590 F.2d 470 (3d Cir. 1978).

The Court of Appeals denied Dr. Skehan's petition for rehearing on February 14, 1979. without opinion. The order is printed in the Appendix at 97a–98a and is unreported.

This Court entered an order denying Dr. Skehan's petition for a writ of certiorari on October 1, 1979. The order of this Court is printed in the Appendix at 44a and is reported at 444US382 (1979).

The District Court entered a judgment November 28, 1980 awarding plaintiff's counsels approximately $20,000 attorney's fees and expenses. The Court of Appeals assigned J. Muir of the District Court to hear Dr. Skehan's motion for award of attorney's fees on several appeals to that Court and this Court where he prevailed; J. Muir declined and designated U. S. Magistrate Durkin, Wilkes Barre to hold hearings on that motion. Before hearings were held the parties agreed to settle for payment of $47,000 to Dr. Skehan's counsels on both judgment of the District Court and the motion originally before the Third Circuit. (See the Third Circuit summary printed in the Appendix at page 5a.)

The District Court denied Dr. Skehan's motion for an award of special damages November 24, 1980: the order is printed in the Appendix at pages 37a, 38a and is unreported. The District Court denied Dr. Skehan's motion to enforce the judgement December 5, 1980; the order is printed in the Apendix at pages 37a - 42a and is unreported. The District Court denied Dr. Skehan's motion to alter or amend February 3, 1981; the order is printed in the Appendix at pages 42a - 43a.

The Third Circuit entered judgment January 26, 1982 affirming the judgments of the District Court of November 24, 1980, December 3, 1980 and February 3, 1981: the opinion is printed in the Appendix at pages 1a - 26a and is reported at 669F.2d 142 (1982).

The Third Circuit denied Dr. Skehan's petition for rehearing

March 26, 1982; with a Statement by J. Adams; the order and statement are printed in the Appendix at pages 27a - 28a. (The American Association of University Professors - hereinafter AAUP - filed a brief amicus curiae to the petition for rehearing; it is reported in the Appendix at pages 31a - 36a). The Third Circuit issued an order amending the Statement by J. Adams on April 6, 1982; the order is printed in the Appendix at pages 29a -30a.

Justice William J. Brennan, Jr. of this Court on June 15, 1982 issued an Order, No. A1078, granting Dr. Skehan's application to extend time to file petition for writ of certiorari to and including August 23, 1982.

JURISDICTION

The Court of Appeals entered judgment affirming the judgment of the District Court on January 26, 1982. The Court of Appeals denied a timely petition for rehearing on March 26, 1982 (Appendix, pages 27, 28a)

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1), granting jurisdiction to this Court to review cases in the Courts of appeals by writ of certiorari before or after rendition of judgment.

Constitutional and Statutory Provisions Involved

This case involves Section 2, Article 3 and Amendment XIV of the Constitution of the United States; Section 11, Article I, of the Constitution of the Commonwealth of Pennsylvania; Title 42 U.S.C. § § 1983 and 1988; the Pennsylvania Mandamus Act of 1893, as amended, 12 P.S. § 1911, *et seq.*; Section 2310 of Pennsylvania Act No. 78-152 (House Bill No. 2437), 42 Pa. C.S.A. § 2310. The texts of these constitutional and statutory provisions are reproduced at the end of this petition.

QUESTION PRESENTED

Whether, in order to provide effective relief for violations of the Fourteenth Amendment, a State can be required to give monetary relief on the ground that the later enactment of the Fourteenth Amendment limited the sovereign immunity granted to the States by the Eleventh Amendment.

Statement of the Case

1. Nature of the Case

This is an action by a college professor who was non-renewed without hearings required by contract, who was later suspended without hearings required by contract and who was dismissed without a hearing required by contract in the middle of his contract term and who seeks reinstatement, back pay, and expenses of litigation, including attorneys fees.

He alleged that he was non-renewed, suspended and dismissed in retaliation for exercise of rights protected by the First Amendment and that the failure to afford him hearings before non-renewal, suspension and dismissal deprived him of procedural due process violative of the Fourteenth Amendment.

Jurisdiction of the District Court was invoked under Title 28 U.S.C. § 1343, granting jurisdiction over civil rights actions.

2. Statement of Facts

Dr. Skehan has been unemployed since October 17, 1970, when he was dismissed by the president of Bloomsburg State College from his post of associate professor of economics, excepting that he was employed in suspended status, without pay, pursuant to the judgment of the District Court, from July 20, 1977, through June 2, 1978.

The background of his employment and dismissal follows. In January, 1969, Bloomsburg State College appointed Dr. Skehan associate professor in the economics department. Dr. Skehan quickly became outspoken on issues of interest on campus, including matters of U.S. foreign policy and questions of college governance such as faculty and student powers and rights.

Plaintiff had a written contract of employment which automatically renewed itself unless the college president gave notice of non-renewal by specified dates. The contract ripen-

ed into permanent tenure after completion of the third year.

The written contract consisted of an individual writing naming Dr. Skehan, signed by him and the president of Bloomsburg State College, and incorporated by reference the existing college employment code.

Dr. Skehan's contract was on its face between him and Bloomsburg State College, not the Commonwealth of Pennsylvania. The college employment code described faculty members as being "employed by the college."

The employment code provided for hearings before any faculty member could be suspended or dismissed. A faculty member could be suspended only if he were found to be a danger to himself or to others or if he were found guilty of treasonable or grossly immoral conduct. The employment code also provided that if an untenured faculty member's contract was not renewed, he could allege that the reason for the decision was violative of his academic freedom. Bloomsburg State College was then required to give him a hearing before a specified faculty committee on the reasons for non-renewal.

Dr. Skehan's employment contract was expressly renewed during the spring of 1969 for the 1969-70 academic year. On December 15, 1969, Dr. Skehan's contract automatically renewed itself for the 1970-71 academic year. No notice of non-renewal was sent by that date.

On December 18, 1969, Dr. Skehan was summoned to the office of the college president, where the president denounced him for his activism in faculty matters. He called Dr. Skehan's petition to the college regarding the rights of another professor as "childish" and "infantile".

In May, 1970, the president informed Dr. Skehan that his contract, although renewed for the 1970-1971 school year, would not be renewed for the 1971-72 year. Dr. Skehan responded by alleging that the decision not to renew his contract was made because of his outspokenness on campus issues.

During the fall of 1970, a dispute arose about scheduling in the economics department. By letter of October 9, 1970, the president purported to suspend Dr. Skehan for his conduct arising out of the scheduling dispute. Dr. Skehan replied by letter of October 12, 1970, that the suspension was not preceded by procedures called for in the college employment code and he demanded such procedures. On October 19, 1970, the president purported to dismiss Dr. Skehan "subject to final approval by the board of trustees." Dr. Skehan wrote each trustee a certified letter requesting hearings in accordance with the college employment code. However, on October 26, 1970, Dr. Skehan received a letter from the president saying that the board met on October 23, 1970, and confirmed the president's decision to dismiss Dr. Skehan and that, accordingly, he was "fully and finally terminated at the college effective October 16."

3. Course of the Proceedings

Dr. Skehan pursued remedies through professional channels and then, on October 10, 1972, began this action. On May 9, 1973, he prevailed in the District Court on his claim that his right to hearings before adverse actions by the college, protected by the due process clause, was violated (214a). After more than seven years of litigation, including a ruling in his favor in this Court in 1975 (176a), he has yet to receive any relief excepting: (i) he was restored to the college payroll by order of the Court (99a-101a) from July 20, 1977, through June 2, 1978; and (ii) the District Court ordered (99a-100a) a hearing by a specified faculty committee, which resulted in a unanimous decision that the non-renewal of his employment contract in May, 1970, was for reasons which were violative of his academic freedom. 102–3.

The Court of Appeals has required (47a-52a) further proceedings in the District Court, which should lead to the award of attorneys fees under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988. The Court of Appeals has also authorized (44a-46a) proceedings in the lower Court

to decide in the first instance whether, under the terms of the District Court's judgment of July 20, 1977, and in light of proceedings at the college level since that judgment, Dr. Skehan should now be reinstated to full faculty status.

Dr. Skehan has been denied back pay by reason of the following rulings in the lower Courts. The Court of Appeals permitted (192a-196a) the college to raise the defense of state sovereign immunity for the first time on Dr. Skehan's appeal in 1973, after trial in the District Court. The Court of Appeals then looked to (28a, 173a) *Brungard v. Hartman*, 12 Pa.Commw. 477, 315 A.2d 913 (1974), the decision of a hybrid trial and intermediate appellate Court, that state colleges are agencies of the Commonwealth for which it claims sovereign immunity. The Court of Appeals held that *Brungard* was dispositive of the issue of sovereign immunity in this action under § 1983 *

Although the Court of Appeals considered (33a-39a) this Court's decision in *Monell v. Department of Social Services of City of New York*, ... U.S. ...., 98 S.Ct. 2018 (1978) on Dr. Skehan's more recent appeal, it made no independent inquiry to determine whether a state college was a "person" under § 1983.

The Court of Appeals also held that Pennsylvania had in force a doctrine of sovereign immunity which barred an action under § 1983 (30a-33a). In so doing, the Court of Appeals interpreted (32a-33a) a sovereign immunity act of the Pennsylvania Legislature, passed September 28, 1978, as barring a § 1983 claim, even though the act expressly preserved causes of action otherwise specifically authorized by statute and even though Pennsylvania had a long-standing mandamus act authorizing actions of this kind. The Court of Appeals ignored the mandamus act and the provisions of Title 42 § 1988 which expressly incorporate remedies provided by the

---

* *Brungard v. Hartman, supra*, was a ruling on a motion to dismiss a complaint alleging that Mansfield State College was owned and operated by the state. Taking the complaint as true, the Court dismissed it.

common law and state statute and the remedies available for violations of § 1983.

The Court of Appeals accorded validity to the Pennsylvania act, as interpreted by it, even though the act annulled a vested right of action by Dr. Skehan retroactively and even though the act was hurried through the legislature with participation of the state's attorney, who was representing all the defendants in this action, but without notice to Dr. Skehan or opportunity for him to be heard. In fact, no legislative hearings were held.

The District Court, on remand, denied Dr. Skehan's motions to amend his complaint (151a-153a) and to introduce additional evidence (145a-150a) even though his lawsuit had been greatly changed by the raising of sovereign immunity for the first time in the Court of Appeals.

The District Court held (123a-126a) that the college president enjoyed official immunity for his violation of Dr. Skehan's constitutionally protected rights to hearings because the president did not and should not have known that he was acting in violation of clearly settled law in 1970, though that Court had found in 1973 that *Wieman v. Undegraff*, 344 U.S. 183 (1952), was "precisely the situation in the case at bar (214a)." The District Court held (124a-125a) that Dr. Skehan's rights were not established as a matter of constitutional law until this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972). The Court of Appeals affirmed (43a-44a) and also held (44a) that the college president did not and should not have known that he was violating a contract because the contract had not been adjudicated by a Court until after this action was brought.

The District Court found (132a-135a, 137a-143a, 208a-212a), pursuant to Rule 52(a), F.R.C.P., that the actions taken by the college against Dr. Skehan were not primarily motivated by Dr. Skehan's outspokenness on campus issues and that they would have been taken for other reasons, including Dr. Skehan's conduct during the scheduling dispute.

The Court of Appeals, while acknowledging (18a, 188a-190a) that there was much evidence to the contrary, sustained (17a-20a, 188a-190a) the District Court's findings as not clearly erroneous. The District Court made its findings in May, 1973, and March, 1977, before it ordered proceedings on the same general subject at the college level. As noted above, hearings in the fall of 1977, before a specified faculty committee, reached an opposite conclusion.

1. In their answer to the complaint, 1973, respondents did not plead the defense of sovereign immunity, nor did they demurr. The district court found a violation of the petitioner's Fourteenth Amendment rights and issued a judgement for $1 and costs against the defendants. They did not appeal.
Only petitioner did appeal. Briefs covered issues raised by Petitioner. At argument the Court of Appeals *sua sponte* raised the issued of sovereign immunity. (236a - 240a): it asked for post argument briefs.
Petitioner noted the long line of apposite cases, e.g., *Clark -v- Barnard,* 108US436, 447-48 (1883), *Missouri -v- Fiske,* 290US18, 24 (1933) through *Lidie -v- State of California,* 478 F.2d 552 (9th Cir. 1973), where failure to plead the sovereign immunity defense, submission to the jurisdiction of the district court even up to a money judgment, failure to appeal or thereafter to seek certiorari review constituted waiver of the defense. Subsequently the Court of Appeals relying upon *Edelman -v- Jordan,* 415US651 (1974) held that the lines of cases *Clark -v- Barnard* et al *supra* "seem to have been overruled" or "have limited applicability." (238a)
The Court noted (n. 7 at 239a) Mr. Justice Marshall's dissent in *Edelman -v- Jordan, supra* at 1371, note 2, holding that the issue of a State's liability for retroactive damages in Federal Constitutional cases was still open, and that in the *Edelman* case "any sovereign immunity, which may exist has been waived" (*ibid*). This parallels the line of cases out of *Clark -v- Barnard, supra.* (See also Skehan Petition to this Court, p6 - 9, #74 - 558).
On remand the Court of Appeals opined that *Brungard -v- Hartman,* 12 Pa Commw, 477, 315A.2d 913 (1974), was dispositive of the status of the college and altered its remand to the district court accordingly. (217a - 218a). Currently *Brungard -v- Hartman supra* is going to trial in the Common

Pleas Court in Pennsylvania; and in the Commonwealth Ct, sub nom. *Brungard -v- Mansfield State College,* 491 Pa 114, 419A.2d 1171 (1980) some ten years after the complaint was filed.

The Supreme Court of Pennsylvania in *Mayle -v- Pennsylvania Department of Highways* 338 A.2d 709, 479 PA 384 (1978) analyzed sources of the sovereign immunity doctrine in Federal statutes and case law, Pennsylvania law, early common law, constitutional law; it summed up the legal treatises about the Eleventh Amendment and the doctrine and reported surveys of the Several States—some 31 (n. 4 *supra)* have at least partially abolished sovereign immunity by judicial action.

In *Hutto -v- Finney* 437US678 (1978) Justice Brennan estimated the definition of "person" found by *Monell -v- Department of Social Services* 436US658 (1978) meant that other "bodies corporate and politic" a class "which literally includes states" (*ibid*) would "vitiate the vitality of *Fitzpatrick -v- Bitzer,* 427US445 (1976)" because Congress had already exercised its § 5 authority to implement the Fourteenth Amendments, i.e., had already made States "persons" and subject to suit under USC § 1983 for damages.

The Court of Appeals in 1978 (73a - 83a) did not reach the argument that the Supreme Court of Pennsylvania abrogated the sovereign immunity of that State both in State and Federal law, *Mayle -v- Dept. of Highways supra.* Accord *Greenfield -v- Vesella,* 457 F. Supp 316, 319-20 (W.D. PA 1978), because that State enacted Act No. 1978-152 on September 28, 1978 reaffirming partial sovereign immunity with a retroactive clause.

The Court of Appeals concluded the changes in Federal law, i.e., *Monell* and *Hutto supra, did not bring it to find Edelman, supra* "no longer good law" (83a); but that *Edelman, supra* precluded an interpretation that Congress had already imposed § 1983 suits upon States by the Civil Rights Act of 1871.

In 1982 the Court of Appeals (8 - 13a) recognized that the State Supreme Court, *Gibson -v- Commonwealth of Pennsylvania,* 490PA156, 415A.2d80 (1980) (and *Brungard -v- Mansfield State College* 419A.2d1171 - PA - (1980), its successor and more german case), negligence suits, had effectively declared the retroactive clause of PA Act No 152, September 28, 1978 as unconstitutional; that since

petitioner's causes of action accrued prior to September 28, 1978, the arguments advanced in 1974 (236a - 240a), in 1975 - 76 (217 - 18a), in 1977 - 78 (71a - 89a) and 1981 - 82 (9a - 13a) needed re-examination.

Greenfield -v- Vesella, supra examined the impact of *Mayle, supra* on the State's sovereign immunity in Federal law, of its submission to Federal jurisdiction, the general and voluntary appearance by the attorney general (as in this case, without demurrer or without amending at anytime in ten years of litigation to claim a defense of sovereign immunity) accord *Clark -v- Barnard supra* and the line of cases cited *supra* and at 236a - 240a.

Greenfield -v- Vesella supra found in *Hens -v- Louisiana,* 134US1, (1890) the argument for the doctrine rested on the statutory concurrent jurisdiction of Federal and State counts over Federal constitutional cases; that a State not permitting §1983 actions to be pursued in State court claimed that since jurisdiction was concurrent Federal Court jurisdiction would create a right of action nowhere else permitted. This court's holding in *Monell -v- Dept. of Social Services of New York, supra* was touched upon in n.4 (8a).

The Court of Appeals declined to consider this argument: it affirmed those recent district and appellate decisions (10a) which oppose it for other reasons. The weight of *Clark -v- Barnard supra* line of cases from 1883 was restored.

Finally, the Court of Appeals relied upon "strong policy considerations" i.e. that the legislative or executive can "evaluate the ability of the state treasury to bear the potential burden" . . . (at 11a) better than the judiciary, Contra. *Mayle supra* (at p. 11). The Pennsylvania Supreme Court reported "no evidence" provided by the executive about "undue clogging of the courts"; "welfare economic analysis . . . government's . . . suable in tort, may become more efficient" (13).

REASONS FOR GRANTING THE WRIT

We submit that a writ of certiorari should be granted on three issues.

The decision of the court of appeals presents the issue whether state sovereign immunity under the Eleventh Amendment is applicable in a suit to recover monetary relief for violations of the Fourteenth Amendment.

We submit that the Fourteenth Amendment, which was designed to prevent and remedy violations of basic rights by the States, implicitly limits the sovereign immunity granted to the States by the Eleventh Amendment.

This issue was not resolved by this Court's recent decision in *Edelman* v. *Jordan*, —— U.S. ——, 94 S.Ct. 1347 (1974). That decision held that the Eleventh Amendment precludes recovery of retroactive monetary relief from a State for violation of the Social Security Act. *Id.* at 1363. Since the lower courts had found only a violation of a federal statute (*id.* at 1352), there was no occasion for this Court to decide whether the Eleventh Amendment is similarly applicable where such state action is alleged to be unconstitutional under the Fourteenth Amendment. See dissent of Mr. Justice Marshall, *id.* at 1371, note 2.

The issue whether the Eleventh Amendment can be invoked to bar an award of monetary relief for violations of the Fourteenth Amendment has been left undecided since this Court's historic decision in *Ex parte Young*, 209 U.S. 123 (1908). There, the plaintiffs argued that the Fourteenth Amendment could be enforced against the States without regard to sovereign immunity because the Fourteenth Amendment limited the Eleventh Amendment. However, this Court expressly refused to decide this issue. *Id.* at 150. Instead, the Court held that injunctive relief could be provided for violation of the Fourteenth Amendment against the defendant state official in his individual capacity, thereby avoiding the problem of sovereign immunity because relief was not directed to the State itself and was awarded only prospectively.

In *Edelman*, the Court rejected the extension of *Ex parte Young* to retroactive monetary relief (94 S.Ct. at 1358), ruling that such relief went beyond the prospective injunctive relief awarded in *Young* and was barred by the Eleventh Amendment. The Court stated that retroactive monetary relief "resembled a money judgment pay-

able out of the state treasury." *Id.* at 1357. However, the Court did not rule in *Edelman* whether such relief would be permissible to remedy violations of the Fourteenth Amendment.

The court of appeals in the present case held that this Court in *Edelman* had implicitly decided that the Fourteenth Amendment did not limit the Eleventh Amendment because it overruled three Fourteenth Amendment cases which provided for monetary relief. 94 S.Ct. at 1359. See *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *State Dept. of Health and Rehabilitative Services* v. *Zarate*, 407 U.S. 918 (1972); *Wyman* v. *Bowens*, 397 U.S. 49 (1969). This was done without any discussion whatever of this issue which had been expressly reserved in *Ex parte Young*. Consequently, we submit that *Edelman* cannot be construed as a determination by this Court of this extremely important and complex question.

There are substantial grounds to support the view that the sovereign immunity granted the States by the Eleventh Amendment is not applicable to restrict relief for state action which is unconstitutional under the Fourteenth Amendment. Both the language of the Fourteenth Amendment itself and the history surrounding its adoption demonstrate that the enforcement of the Fourteenth Amendment was not intended to be restricted by the doctrine of sovereign immunity under the previously adopted Eleventh Amendment. By its explicit language—"No State shall * * *"—the Fourteenth Amendment imposes restraints directly upon the States.

The basic purpose of the Fourteenth Amendment was to restrict actions of the States themselves, not merely wrongful actions by individual state officials. The Fourteenth Amendment and the other amendments adopted in the aftermath of the Civil War constituted a substantial change in the supremacy of state governments vis-a-vis their citizens. Those amendments were adopted precisely because the States were no longer trusted to exercise their sovereignty to protect the rights of their citizens and

they substantially restricted the prior sovereignty and reserved rights of the States. Whereas the Eleventh Amendment had been adopted with the view that the States could be relied upon to provide justice to their citizens and others, that policy was expressly rejected by Congress when it approved the Fourteenth Amendment.

There is no indication that the Congress which enacted the post-Civil War Amendments and the States which ratified them intended that actions against the States would be limited to injunctive relief. In fact, the traditional and most effective remedy for injuries resulting from a violation of constitutionally protected rights has been money damages. *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 395 (1971); *Scheuer* v. *Rhodes*, —— U.S. ——, 94 S.Ct. 1683, 1687 (1974). Consequently, such relief is both appropriate and necessary in order to enforce the basic constitutional rights protected by the Fourteenth Amendment. We therefore submit that the doctrine of sovereign immunity cannot bar citizens from obtaining effective relief for violations of their constitutional rights under the Fourteenth Amendment. Cf. *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 228 (1964).

This issue is obviously of great constitutional importance. On the one hand, it involves the right of the States to be free from having to pay monetary damages. On the other hand, it involves the right of citizens to obtain an effective remedy for violations of basic constitutional rights ranging from freedom of speech to procedural due process. As this case illustrates, prospective injunctive relief is frequently not an adequate remedy for past violations of the Fourteenth Amendment.

Recently (see Course of Proceedings, supra) this Court has in Monell, supra, Hutto, supra, suggested States are in the class "bodies corporate and politic", a class set up in the Civil Rights Act of 1871, par. 1983, and therefore amenable to damage suit. See also State of Nevada et al. v. Hall, 440 U.S.410 and Florida Department of Health and Rehabilitation

Services v. Florida Nursing Home Association, __U.S. ___101 S. Ct. 1032 (1981).

The line of cases Clark v. Barnard, supra, Missouri v. Fiske, supra, Smith v. Reeves, supra, all suggest States are persons, that the immunity of States in rationae personae (sic), a "personal immunity","a personal privilege".

Recent cases have suggested that the immunity of States is not absolute, but limited, Nevada v. Hall, supra, Florida Department of Health and Rehabilitation Services v. Florida Nursing Home Association, supra; Article III Section II is literally one of those limits, and literally leaves States amenable to damages in constitutional tort cases. It has been a limit of the Constitution from the beginning.

More States like Pennsylvania, see Mayle, supra , have abolished in whole or part sovereign immunity. Indeed the Supreme Court noted that 31 have done so, recently Mayle supra, n. 4.

Petitioner submits that in constitutional cases at least, States are amenable to suit for damages, at least when their own States Constitution, Statutes or Case Law have limited it; or whenever the State fails to plead that defense in its answer in Federal Court.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Dr. J. T. Skehan
638 East Third Street
Bloomsburg, Pa., 17815

tel. (717) 784-7368

DR. JOSEPH T. SKEHAN
petitioner
pro se

CONSTITUTION OF THE UNITED STATES

Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XI

(Reproduced in the Appendix, at N.3, 138a.

TITLE 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

TITLE 42 U.S.C. § 1988

(Reproduced in the Appendix, printed separately, at 92a).